United States District Court
Eastern District of Tennessee
Greeneville Division

STATE OF TENNESSEE, *ex rel.* ROBERT E. COOPER, JR., Attorney General and Reporter,	)	
Plaintiff,	)	Case No. 2:13-cv-00343
v.	)	GREER / INMAN
ESCAPES, INC., *et al.*,	)	**PLAINTIFF REQUESTS ORAL ARGUMENT AT THE COURT'S CONVENIENCE**
Defendants.	)	

PLAINTIFF STATE OF TENNESSEE'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff, State of Tennessee ("State" or "Attorney General"), hereby responds to and opposes certain defendants' and relief defendants' motions to dismiss under Fed. R. Civ. P. 12(b)(6) and 12(b)(2). As set forth below, Moving Defendants and Moving Relief Defendants[1] (collectively "Defendants") misapprehend the nature of a civil law enforcement proceeding and misconstrue the law. The motion to dismiss should therefore be denied for the following reasons:

First, the Complaint adequately alleges violations of the Telemarketing Sales Rule ("TSR"), 16 C.F.R. 310, of the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101 – 6108, and the Tennessee Consumer Protection Act of 1977 ("TCPA"), Tenn. Code Ann. §§ 47-18-101 – 125. The Complaint readily satisfies the pleading standards of Fed. R. Civ. P. 8(a) as a whole and through its individual Counts.

[1] 811 Development Corporation, Festiva Sailing Vacations, Inc., Financial Information Services, Inc., Kosmas Group Int'l, Inc., Resort Management Services, Inc., and Zealandia Holdings, LLC will be referred to herein collectively as "Moving Relief Defendants."

Second, Fed. R. Civ. P. 9(b) does not apply to remedial consumer protection claims brought under the TCPA or TSR, particularly where the parties are strangers. In any event, the claims in Counts I, IV, VI, and VII are adequately pled within the standard set forth in Rule 9(b).

Third, the several Defendants challenging the 10-day statutory notice provision in Tenn. Code Ann. § 47-18-108(a)(2) misapprehend its purpose, function, and limited applicability here. The State may forgo notice where, as here, it has determined that the purpose of this provision would not be served by further delay. Moreover, Tenn. Code Ann. § 47-18-108(a)(2) does not apply to claims under the TSR or for disgorgement against relief defendants.

Fourth, this Court has personal jurisdiction over the five 12(b)(2) Moving Defendants[2] and six Moving Relief Defendants (collectively "Rule 12(b)(2) Defendants"). Several of these Defendants already consented to or waived personal jurisdiction in Tennessee by filing a related (still pending) Tennessee proceeding against the Attorney General in the Davidson County Circuit Court. In addition, the Complaint explicitly alleges that all Moving Defendants and Moving Relief Defendants transact business in Tennessee, and operate in concert, as a common enterprise, and as agents of one another and of all Defendants, including those Defendants who regularly and purposefully avail themselves of the privilege of doing business in Tennessee.

BACKGROUND, ALLEGATIONS, AND FACTS[3]

This civil law enforcement proceeding was brought by the Tennessee Attorney General on December 30, 2013 alleging violations of the TSR and the TCPA. Compl. ¶¶ 1, 4, 5 [Doc. 1]. The

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[2] Human Capital Solutions, Inc. (f/k/a Festiva Resort Services, Inc.), Zealandia Holding Company, Inc. (f/k/a Festiva Hospitality Group, Inc.), Clayton, Patrick, and Hartnett.

[3] This section cites both to the Complaint and to extraneous evidence to the extent Defendants have moved to dismiss under Fed. R. Civ. P. 12(b)(2). Defendants have further introduced extraneous facts in support of their Rule 12(b)(6) motion, such as their argument regarding the 10-day notice provision in Tenn. Code. Ann. § 47-18-108(a)(2). The State is content to rely solely on the allegations of the Complaint should the Court determine that Defendants' Rule 12(b)(6) motion should be limited to the allegations in the Complaint.

Attorney General is authorized by 15 U.S.C. § 6103(a) of the Telemarketing Act to file this action as *parens patriae* in federal district court to enjoin violations of the TSR and by Tenn. Code Ann. § 47-18-108 of the TCPA, to obtain permanent injunctive relief, rescission, reformation of contracts, restitution, disgorgement of ill-gotten gains, and other equitable and statutory relief for Defendants' acts or practices in violation of the TSR and TCPA. *See also* Compl. ¶ 5.

The State alleges that Festiva, and Clayton, Patrick, and Hartnett have violated and continue to violate the TSR and the TCPA by directly and indirectly engaging in, and assisting and facilitating, deceptive and abusive sales acts and practices in Tennessee. *Id.* at ¶¶ 6-21.[4] The State further alleges that all Moving Defendants and Moving Relief Defendants[5] have received ill-gotten funds from Festiva's unlawful conduct, have no legitimate claim to such funds, and that such funds must be disgorged. *Id*. at ¶¶ 22-28, 141-143.

Clayton, Patrick and Hartnett
(*Festiva's Founders, Owners, Operators and Officers*)

Clayton, Patrick, and Hartnett are all timeshare industry veterans and have sold, or overseen the sale of, hundreds of thousands of dollars of timeshares and vacation products to consumers in Tennessee and elsewhere. *Id.* at ¶ 56. Clayton began working in timeshare sales in 1985. Clayton Dep. 9:7-15, 9:22-23, May 1, 2014 **[A611]**. Patrick began working in the timeshare industry in 1996. Patrick Dep. 8:13:24, May 1, 2014 **[A647]**. Hartnett began working in timeshare sales in 1987. Hartnett Dep. 6:9-23, May 1, 2014 **[A704]**.

Clayton, Patrick, and Hartnett are all owners, operators, officers, and principals of Festiva, and have been actively involved in Festiva's day-to-day operations. Compl. ¶¶ 19-21. Clayton, Patrick, and Hartnett have transacted and continue to transact business in this District. *Id.* In connection with the unlawful conduct alleged in the Complaint, Clayton, Patrick, and

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[4] Defendant Escapes!, Inc., was voluntarily dismissed from this action on March 31, 2014 [Doc. 40].

[5] Two of the "Trust" relief defendants, who are not Moving Relief Defendants, filed waivers of service, [Docs. 52, 53], but have not responded through a challenge to jurisdiction.

Hartnett, acting alone or in concert with others, have formulated, directed, controlled, had the authority to control, and participated in the acts and practices of Festiva, and have assisted and facilitated the same, including the unlawful acts and practices alleged in the Complaint. *Id.* Throughout the mid-2000s, Clayton, Patrick, and later Hartnett, acquired timeshare interests for Festiva, including timeshares at the Laurel Point Resort near Gatlinburg, Tennessee. *Id.* at ¶ 61. Clayton and Patrick prominently feature themselves in Festiva's marketing materials. **[A1965, 2307-2314]**.[6] Hartnett is identified a top Festiva executive. **[A1962, 1965, 1983]**.

After joining Peppertree Resorts in 1985, Clayton became one of its best timeshare salesmen. Clayton Dep. 10:14-16, 11:14-16 **[A612]**. He was promoted to project director and supervised his own timeshare sales team. *Id.* at 11:18-12:12 **[A612]**. In September 1986, Clayton filed an application with the Tennessee Real Estate Commission ("TREC") for a non-resident Tennessee real estate license, **[A356]**, a privilege he pays for and maintains to date. **[A162-359]**.

On August 22, 2002, Clayton entered into an Agreed Order with the TREC to settle allegations that he operated as a Tennessee realtor without the required insurance. **[A320-330]**.[7] Clayton's Tennessee real estate license also includes his explicit and irrevocable "Consent to Jurisdiction" to suit within the State of Tennessee for any actions related to his acts or omissions as a real estate broker or affiliate broker within the State of Tennessee. **[A294, A303]**. In addition, Clayton is the designated "Principal Broker" in Tennessee for Festiva Resorts (n/k/a Festiva Real Estate Holdings, LLC), **[A28-31]**, and has personally filed renewal papers for Festiva Resorts' Tennessee license. **[A47]**. Clayton has also executed reporting documents with state authorities for other Festiva entities. **[A49, 55, 59-63, 65, 974-975].** Patrick similarly regularly executes and files reporting documents on behalf of Festiva with various state

[6] These documents were produced to the State by Festiva during its investigation of Defendants and were certified as Defendants' business records. *See* **[A2-24]**.

[7] In response to an investigative subpoena served upon Clayton last year, Clayton represented under oath that other than the present matter, and a lawsuit filed against him by the State of Maine, he has never been put on notice of any investigation against him in his individual capacity. **[A2-4]**.

authorities. **[A49, 55, 59-63, 65, 967-968, 971-976, 979-980, 985-989, 994].**

In late 1986, Clayton was assigned to Peppertree's Laurel Point timeshare property in Gatlinburg, Tennessee. *Id.* at 14:8-15:1 **[A613]**. (Laurel Point was later acquired by Festiva in 2007 and prominently marketed by Festiva as its Tennessee resort. **[A1929-1931, 1971, 2307-2314]**). During his time at Laurel Point, Clayton personally participated in timeshare sales, giving tours, sales presentations, closings, training, and even helping salespeople "close" by conducting "takeovers," or "TOs." *Id.* at 15:10-16:25 **[A613]**.[8] A few months later, Clayton went to work for Fairfield Resorts as a timeshare salesperson, *id.* at 17:18:2-19:8 **[A613-614]**, and one year later, returned to Peppertree to help "sell out" the rest of Peppertree's Maggie Valley Resort, and head a small group of timeshare salespeople. *Id.* at 19:12-13, 20:2-21:7-19 **[A614-615]**. After Maggie Valley sold out, Clayton went to work at another Peppertree timeshare in North Carolina as a project director, responsible for all aspects of sales. *Id.* at 22:7-24 **[A615]**. In 1991-1992, Clayton was promoted to the vice president position at Peppertree, and later returned to Peppertree's headquarters at One Vance Gap Road, Asheville, North Carolina.[9] *Id.* at 24:1-9, 24:15-25:11 **[A615]**. Clayton was responsible for seven or eight Peppertree resorts. *Id.* at 25:12-23. **[A615]**. In 1999, Peppertree was acquired by Equivest. Patrick Dep. 10:6-8 **[A648]**. At this time, Clayton and Patrick met Hartnett, who worked for Equivest overseeing sales for different properties. *Id.* at 44:12-21, 45:3-8 **[A656]**. Clayton disagreed with the Equivest CEO's leadership style and other things, and left on June 5, 2000. Clayton Dep. 27:11-13, 28:10-29:2 **[A616]**. That same day, Clayton and Patrick decided to form Festiva. Patrick Dep. 13:8-12 **[A648]**.

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[8] This time period falls within the time period covered by the Complaint. It should also be noted that in the Affidavit Clayton filed in support of the motion to dismiss, he states he "never solicited business in his personal capacity in Tennessee; Clayton Aff. ¶ 5, "never personally derived revenue directly from goods used or consumer or services rendered in Tennessee," *id.* at ¶ 7, has "never actually used [his Tennessee real estate license] or had cause to use it," *id.* at ¶ 11, "never been sued or made a general appearance in Tennessee," *id.* at ¶ 14, and does not "have a registered agent for service of process in Tennessee." *Id.* at ¶ 16.

[9] As will be explained in subsequent section of this Memorandum, One Vance Gap Road, Asheville, North Carolina, is the Defendants' common business address.

A Decade of Festiva Entities and Name Changes

Festiva Resorts, LLC, n/k/a Festiva Real Estate Holdings, LLC

On August 14, 2000, two months after separating from Peppertree/Equivest, Clayton and Patrick formed their first Festiva entity, Festiva Resorts, LLC ("Festiva Resorts").[10] Patrick Dep. 17 **[A649]** and Ex. 2 thereto **[A768-773]**; *Cf*. Clayton Dep. 30:25-31:3 **[A617]**; Compl. ¶ 33.[11] Hartnett joined Festiva Resorts in late 2001 to do sales and marketing. Patrick Dep. 45:18-21, 46:4-10 **[A656-657]**. Since 2000, Clayton and Patrick, with assistance from Hartnett, began acquiring older, neglected or distressed second- or third-generation timeshare properties and developers' rights from timeshare owners or developers. Compl. ¶ 57.

On September 4, 2003, Festiva Resorts registered as a telemarketer with the Federal Trade Commission ("FTC"), and paid fees to access over 300 area codes in the United States, including Tennessee area codes 423,615,731,865,901, and 931. *Id*. at ¶ 38. According to records from the Tennessee Regulatory Authority ("TRA"), Festiva Resorts did not register as a Tennessee telemarketer until 2009. **[A2296-2306].** To date, Festiva Resorts has listed over 60 different telemarketers who were or are authorized to place telemarketing calls on its behalf. Compl. ¶ 38. Festiva Resorts has sold and continues to market and sell timeshares and vacations to consumers. Patrick Dep. 16:7-15 **[A649]** and Ex. 2 thereto **[A768]**.[12] Festiva Resorts makes telemarketing calls to Tennessee consumers and places calls from Tennessee to sell goods or

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[10] On June 27, 2011, Patrick and Clayton changed Festiva Resorts, LLC's name to Festiva Real Estate Holdings, LLC. Patrick Dep. 39:1-40:3 **[A655]**.

[11] A third individual, former Peppertree communications director Stephanie Smith had a 20% ownership interest in Festiva Resorts and was listed as a third organizer. Patrick Dep. 17:20-19:4 **[A651]** and Ex. 2 thereto **[A770]**. Approximately one year later, Clayton and Patrick purchased Ms. Smith's 20% interest because she "did not have any skill sets that would help grow the company." Patrick Dep. 19:11-19 **[A770]**. According to Festiva Resorts' 2002 Annual Report, Ms. Smith was deleted as a Festiva Resorts member effective November 9, 2001. *See* Patrick Dep., Ex. 2 **[A775]**.

[12] According to Festiva Resorts' Articles of Organization, one of its purposes was "[t]o manage, sell, lease, or develop resorts and like businesses." Patrick Dep. 16:7-15 **[A649]** and Ex. 2 thereto **[A768]**.

services, including timeshares and vacations. Compl. ¶ 35.

Festiva Resorts letterhead is often used by the Festiva Entities to conduct business. **[A342-346]**.[13] When it registered as a telemarketer with the TRA on March 27, 2009, Festiva Resorts was listed as the name that Festiva Development Group, LLC ("FDG") would use in its telemarketing calls to the public. **[A2297]**. FDG listed SETI Marketing, Inc. (n/k/a Zealandia Capital), as its telemarketer. *Id*. Patrick signed the registration form as President of FDG. *Id.*

On March 29, 2011, Festiva Resorts, LLC, became a wholly-owned subsidiary of FDG. Compl. ¶ 33. On January 30, 2012, Clayton and Patrick, acting through FDG, changed Festiva Resorts, LLC's name to Festiva Real Estate Holdings, LLC ("Festiva Resorts" or "FREH"), and made Hartnett its Vice President. *Id*. at ¶ 33. Clayton and Patrick continuously served as Festiva Resorts' managing members since its inception until approximately June 26, 2008. *Id*. at ¶ 34. Clayton continues to serve as Festiva Resorts' CEO, and Patrick continues to serve as its President. *Id*. As reflected in its annual reports, Clayton and Patrick were Festiva Resorts' sole members[14] until June 26, 2008, when Clayton and Patrick made FDG the sole managing member. Patrick Dep. 27:25-10 **[A652]**, 47:14-10 **[A657]**, and Ex. 2 thereto **[A770, 772, 775-789]**. Although Patrick and Clayton changed Festiva Resorts' name on January 26, 2012 to Festiva Real Estate Holdings, LLC **[A41-44]**, the name "Festiva Resorts" has been actively used in marketing by the Festiva. *See* Ex. 25 to Hartnett Dep. **[A1980-1986]**. Patrick acknowledged but downplayed this fact during his deposition. Patrick Dep. 40:11-25 **[A655]**. All Festiva employees ultimately report to Clayton and Patrick. *Id*. at 112:17-113:20 **[A673]**.

On February 28, 2012, Clayton, as Festiva Resorts' Principal Broker in Tennessee, filed a sworn application with the TREC to change Festiva Resorts' name to FREH. **[A27-32]**.

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[13] Aug. 2, 2002 Letter from legal counsel on Festiva Resorts letterhead sending Festiva Resorts Services, LLC check for Clayton's casualty insurance, later forwarded to the TREC connection with Clayton's Tennessee real estate license.

[14] Patrick Dep. 21:2-13 **[A650]**, 22:15-23:3 **[A651]**, 23:15-20 **[A651]**, 23:25-24:11 **[A651]**, 24:19-25:3 **[A651]**, 25:14-25 **[A651-652]**, 27:2-15 **[A652]**.

Clayton listed his source of income as "CEO of Festiva Hospitality Group, Inc." *Id*. Clayton also executed an irrevocable "Consent to Jurisdiction" on behalf of Festiva Resorts/FREH. **[A33]**.[15]

Festiva Resort Services, Inc., n/k/a Human Capital Solutions, Inc.

On June 22, 2001, Clayton and Patrick formed Festiva Resort Services, Inc. ("FRS"). Compl. ¶ 36; **[A936-37]**. Clayton and Patrick, and later Hartnett, have continuously served as owners, operators, officers, and directors of FRS. Compl. ¶ 36; **[A939-947, 953, 956-966]**. On May 25, 2005, Hartnett also became an officer of FRS. *Id*. Initially, FRS provided administrative support to Clayton, Patrick, and Festiva Resorts, and later to Hartnett and Festiva. *Id*. For example, on July 31, 2002, FRS paid a $195 fee for Clayton's casualty insurance, which Clayton submitted to TREC in a reinstatement request for his Tennessee real estate license. **[A344-346]**.[16] On January 22, 2013, Clayton and Patrick, acting through Festiva Hospitality (n/k/a Zealandia Holding Company, Inc.), changed FRS' name to Human Capital Solutions, Inc. ("FRS/Human Capital"). Compl. ¶ 37. **[A967-968]**. Later, on December 29, 2006, Festiva Hospitality, acting through Patrick, acquired FRS/Human Capital. **[A949-952]**.

Festiva Hospitality Group, Inc. n/k/a Zealandia Holding Company, Inc.

On July 15, 2004, Clayton and Patrick formed Festiva Hospitality. Compl. ¶ 39. Clayton and Patrick have consistently served as Festiva Hospitality's owners, operators, officers, and directors. *Id*. Festiva Hospitality has been engaged in the sales and marketing of timeshares and vacations. *Id*. Since 2006, Festiva Hospitality began to acquire ownership and management interests in other Festiva entities. *Id*. at ¶ 40. The name "Festiva Hospitality Group" has also served as a d/b/a name or umbrella for Festiva. *Id. See also* **[A741-756, 759-761]**. In 2013, Clayton, Patrick, and Hartnett changed Festiva Hospitality's name to Zealandia Holding Company, Inc., but continue to do business as Festiva Hospitality Group. Compl. ¶ 40.

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[15] During a recent deposition, Clayton claimed not to have been aware until the present lawsuit was filed that Festiva conducted business in Tennessee. Clayton Dep. 53:17-22 **[A622]**.

[16] The FRS check was signed by Patrick. **[A346]**.

See also **[A2307-2314].**

Since its inception, Festiva Hospitality/Zealandia Holding, directly and through Festiva, placed or caused to be placed, outbound telephone calls to Tennessee consumers and others, including telephone calls originating in Tennessee, for the purpose of selling goods or services, including timeshares and vacations. *Id.* at ¶ 41.[17] In May 2008, Hartnett became Vice President of Festiva Hospitality, and continuously served as such until 2013. *Id.* Festiva Hospitality wholly owns or maintains a controlling or managerial interest in each Festiva entity. *Id.* at ¶ 54. As seen in Festiva Hospitality's financial statements for 2010 and 2011, Festiva Hospitality controls all of the other Festiva subsidiaries, and is in the business of, *inter alia*, marketing and selling vacation ownership interests. **[A1326]**. A description of Festiva's complete operations is also set forth there, along with a list of all the Festiva entities which operate under the Festiva Hospitality umbrella, as controlled by Clayton and Patrick. **[A1326-1328, 1340-1342]**. In addition, various transactions and activities are conducted among the Festiva entities themselves, and their owners and operators. **[A1344-1349]**. *See also* **[A2282, 1371-1790]**. The extent of monetary benefit realized by Clayton, Patrick, and Hartnett from Festiva is especially apparent in the latter exhibits. *Id.*[18]

SETI Marketing, Inc., n/k/a Zealandia Capital, Inc.

On March 9, 2005, Clayton and Patrick formed SETI Marketing, Inc. ("SETI" or "Zealandia Capital"), which has been engaged in the sale and marketing of goods and services, including timeshares and vacations, and later, in delinquent account collection. Compl. ¶ 42; **[A1007-1008]**. Clayton and Patrick continuously served as SETI's owners, operators, and officers until 2013. **[A1010-A1040]**. On February 15, 2012, Clayton and Patrick changed SETI's

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[17] Festiva also operates a telemarketing center in Johnson City, Tennessee, Patrick Aff. ¶ 10 [Doc. 33], from where much of the unlawful telemarketing at issue here is believed to have originated. Notwithstanding his statement about Festiva's Johnson City call center, Patrick did not seem to know much about it when asked about it during his May 1, 2014 deposition. Patrick Dep. 89:6-92:15, 98:4-25, 105:2-22; 112:22-113:7, **[A667-673]**.

[18] All the documents referenced in this paragraph were produced to the State by Festiva during its investigation and were certified as Defendants' business records. *See* **[A2-24].**

name to Zealandia Capital, Inc. Compl. ¶ 42; **[A1027-1029]**. Shortly thereafter, acting through Clayton and Patrick, Festiva Hospitality acquired SETI n/k/a Zealandia Capital. **[A1030-1036]**. As previously noted, SETI n/k/a Zealandia Capital was the telemarketing entity identified by FDG in its 2009 Tennessee telemarketing registration. **[A2297]**.

Festiva Development Group, LLC

On March 24, 2005, Clayton and Patrick formed the Festiva Development Group, LLC. Compl. ¶ 43. FDG is the declarant for, and administers, a Festiva product known as the "Festiva Adventure Club."[19] From time to time, FDG has used "Festiva Adventure Club" as an assumed name. *Id*. FDG has been engaged in the sale and marketing of timeshares and vacations. *Id*. On or about June 26, 2008, FDG became the sole managing member of Festiva Resorts, and on or about March 29, 2011, wholly acquired Festiva Resorts. Compl. ¶ 39.

On November 25, 2008, Clayton and Patrick registered FDG in Tennessee as a foreign limited liability company. Compl. ¶ 45. **[A1224-1227]**. On June 30, 2009, Clayton and Patrick registered FDG as a telemarketer with the State of Tennessee. **[A2296-2297]**. Patrick signed the application as President of FDG. *Id*. At all times relevant hereto, Clayton and Patrick have continuously acted as FDG's owners, operators, and officers, and FDG has continuously maintained its Tennessee registrations as a telemarketer and foreign LLC. *Id*.; **[A2296-2306]**.

Festiva Management Group, LLC, n/k/a Patton Hospitality Management, LLC

On March 24, 2005, Clayton and Patrick formed Festiva Management Group, LLC ("Festiva Management"). Festiva Management has been engaged in operating Festiva properties, including properties allegedly available for use by Festiva Adventure Club

[19] The Festiva Adventure Club is a purported interval vacation membership club whereby consumers are supposed to be able to take vacations at Festiva properties based on the number of "points" they own in the Festiva Adventure Club. On November 10, 2011, Clayton and Patrick registered "Festiva Adventure Club" with the Tennessee Secretary of State as an assumed name to be used by FDG. Compl. ¶ 47. In addition, in March 2009, the Festiva Adventure Club requested an exemption from the TREC from registering as a Timeshare Plan. **[A360-603]**. Details about its Gatlinburg, Tennessee property are included. **[A563-564, 602]**.

members. Compl. ¶ 46. Clayton and Patrick have continuously acted as Festiva Management n/k/a Patton Hospitality's owners, operators, and officers, directly **[A1115-1158]** and indirectly, through Festiva Hospitality once it acquired Festiva Management in late 2006. **[A1159-1162, 1165-1174]**. On October 26, 2012, Clayton and Patrick changed Festiva Management's name to Patton Hospitality Management, LLC. **[A1173]**. On January 13, 2014, after this lawsuit was filed, Clayton and Patrick named new managers for Festiva Management n/k/a Patton Hospitality. **[A1180-1181]**.

Festiva Resorts Adventure Club Members' Association, Inc.

On July 13, 2006, in conjunction with their creation of the Festiva Adventure Club, Clayton and Patrick created the Festiva Resorts Adventure Club Members' Association, Inc. ("FRACMA"). Compl. ¶ 48; **[A1987-1988]**. FRACMA operates as a trust which holds the timeshare interests that are supposed to be made available to Festiva Adventure Club members. Compl. ¶ 48. Clayton, Patrick, Hartnett, and the Festiva Entities have used FRACMA to buy and sell timeshares and other goods and services, including vacations, to consumers. Compl. ¶ 49. Clayton and Patrick have generally served as directors of FRACMA, along with various Festiva employees, until 2013. *Id.* **[A2002, 2012-2098]**. On December 5, 2008, Clayton and Patrick caused FRACMA to be registered in Tennessee as a foreign corporation. *Id.* **[A2000]**.

Festiva Travel & Xchange n/k/a Resorts Travel & Xchange

On or about September 28, 2011, Clayton, Patrick, and Hartnett created Festiva Travel & Xchange, LLC. On April 24, 2013, Clayton, Patrick and Hartnett, acting through Festiva Hospitality Group (n/k/a Zealandia Holding Company), registered Festiva Travel & Xchange in Tennessee as a foreign limited liability company. Compl. ¶ 50. Resort Travel & Xchange was created to exchange vacation benefits within the Festiva enterprise and, on a limited basis, outside the Festiva enterprise. Compl. ¶ 50.

Escapes Travel Choices, LLC

Since at least 2010, Escapes Travel Choices, LLC, has directly and actively participated

in Festiva's sales and marketing of timeshares and vacations, including telemarketing, or has assisted and facilitated the same, and has engaged in the unlawful acts and practices alleged in this Complaint. Compl. ¶ 52. During 2013, Patrick became its Chief Executive Officer and serves as one of its directors. Compl. ¶ 52.

Etourandtravel, Inc.

Since at least 2012, Etourandtravel, Inc. has directly and actively participated in Festiva's sales and marketing of timeshares and vacations, including telemarketing, or has assisted and facilitated the same, and has engaged in the unlawful acts and practices alleged in this Complaint. Compl. ¶ 52. During 2013, Patrick became its Chief Executive Officer and serves as one of its directors. Compl. ¶ 53. Etourandtravel is also a registered Tennessee telemarketer. **[A2283-2295]**.

Zealandia Holdings, LLC

Zealandia Holdings was formed to hold Festiva's headquarters in the Zealandia building at One Vance Gap Road, Asheville, North Carolina. Patrick Dep. 32:3-8 **[A653]**. It was created by Clayton and Patrick on March 23, 2005, **[A2102]**, and has been owned and controlled by Clayton and Patrick since its inception. **[A2102-2115]**. Patrick acknowledged that Festiva's auditors viewed Zealandia Holdings as a related company that should be consolidated in the Festiva financial statements. Patrick Dep. 121:23-122:4 **[A675-676]**. *See also* Financial Statements **[A1328]**. Zealandia Holdings also held a note in connection with a debt owed to it by FREH, received payments on that note and collected interest. *Id.* at 130:20-131:5 **[A678]**. The interest Zealandia Holdings collected was in turn distributed to Clayton and Patrick. *Id*. at 131:23-132:10. In the preceding year alone, Clayton and Patrick received approximately $380,000 each from such "interest." *Id*. at 133:5-13. Zealandia Holding also sold the One Vance Gap Road property for approximately $4.9 million. *Id*. at 133:17-21.

Moving Relief Defendants

The Complaint alleges that Moving Relief Defendants 811 Development Corporation,

Festiva Sailing Vacations, Inc., Financial Information Services, Inc., Kosmas Group Int'l, Inc., Resort Management Services, Inc., and Zealandia Holdings, LLC, all currently or recently have operated through One Vance Gap Road, Asheville, North Carolina **[A2248-51, 2278-2281, 2291]**, as their principal place of business or mailing address. Compl. ¶¶ 22-28. Between 2013 and the present, Patrick has served as CEO and President of 811 Development **[A2249-2250]**,[20] Financial Information Services, **[A2278-2281]**, and Kosmos International, **[A2291]**. *See also* Patrick Aff. [Doc. 33]. Clayton and Patrick formed Festiva Sailing, until recently continuously served as its owners, operators and officers, and featured it prominently in their Festiva advertising, including press releases and materials distributed to approximately 600 Tennessee consumers by Festiva. **[A741-756, 2116-2174]**. All Moving Relief Defendants are further alleged to transact and conduct business in this District, and have received ill-gotten funds from the unlawful acts and practices committed by the other Defendants, as alleged in the Complaint, without any legitimate claim to those funds. Compl. ¶¶ 22-28, 141-143.

ARGUMENT

I. The Complaint adequately alleges violations of the TSR and the TCPA

The Complaint adequately alleges that all defendants engaged in acts and practices which violate the TSR and TCPA. To the extent the standard set forth by Defendants under Fed. R. Civ. P. Rule 12(b)(6) in incomplete, the State submits the following additional analysis.

First, as the movant, defendants maintain the burden of showing that no plausible claim for relief has been presented by the State. *See* 2-12 James Wm. Moore et al., *Moore's Federal Practice* § 12.34[1][a] (2014) ("The party moving for dismissal has the burden of showing no claim has been stated."). Second, as this Court has observed, "[a] motion to dismiss under Rule 12(b)(6) requires the Court to construe the allegations in the complaint in the light

[20] According to documents filed by Patrick, at or near the time this lawsuit was filed, Patrick decided to "dissolve" 811 Development and Financial Information Services **[A2249-2250, 2278-2281]**. Moreover, most of the relief defendant companies were not disclosed to the State by Festiva in response to requests for information concerning related companies or affiliates. **[A1-24, A69-161]**.

most favorable to the plaintiff and accept all the complaint's factual allegations as true." *Cannon v. Citicorp Credit Servs, Inc.*, No. 2:12-CV-88, 2014, WL 1267279, at *1 (E.D. Tenn. Mar. 26, 2014), (citing *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 475 (6th Cir.1990)). "The Court may not grant a motion to dismiss based upon a disbelief of a complaint's factual allegations." *Cannon*, 2014 WL 1267279, at *1 (citing *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir.1990). Equally important is the requirement that "[t]he Court must liberally construe the complaint in favor of the party opposing the motion." *Cannon*, 2014 WL 1267279, at *1 (citing *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir.1995)). This is especially so in a case brought under remedial consumer protection statutes such as the TSR and TCPA.[21]

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Cannon*, 2014 WL 1267279, at *1 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Iqbal*, 556 U.S. at 678 (same). "The plausibility standard is not equivalent to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Adkins v. Chevron Corp.*, 960 F. Supp. 2d 761, 764 (E.D. Tenn. 2012) (quoting *Iqbal*, 556 U.S. at 678 and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). The plaintiff cannot rely on "legal conclusions" or "[t]hreadbare recitals of the elements of a cause of action." *Id*. "Moreover, this Court need not 'accept as true a legal conclusion couched as a factual allegation.'" *Cannon*, 2014 WL 1267279, at *1 (quoting *Twombly*, 550 U.S. at 555; *Ashcroft*, 556 U.S. at 678). Thus, under *Twombly*, dismissal is proper only when the Complaint consists of nothing more than "labels and conclusions," or contains "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555.

When construed in the light most favorable to the State, accepting all factual allegations

[21] "[T]he TCPA is explicitly remedial, and Tennessee courts are therefore required to construe it liberally to protect consumers in Tennessee and elsewhere." *Tucker v. Sierra Builders*, 180 S.W.3d 109, 115 (Tenn. Ct. App. 2005) (citing Tenn. Code Ann. § 47–18–115; *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 925 (Tenn. 1998); *Morris v. Mack's Used Cars*, 824 S.W.2d 538, 540 (Tenn. 1992)). *See also* Tenn. Code Ann. §§ 47-18-102, -115.

as true, the State's allegations are sufficient 'to raise a right to relief above the speculative level,'" *Cannon*, 2014 WL 1267279, at *1 (quoting *Twombly*, 550 U.S. at 555), "and to 'state a claim to relief that is plausible on its face,'" *id.* (citing *Twombly* 550 U.S. at 570; *Iqbal*, 556 U.S. at 662). For example, the Complaint explicitly alleges that Defendants violate the law by calling consumers who are listed on the National Do-Not-Call Registry, even in instances where consumers have advised Festiva they are listed on the Registry, or have previously asked Festiva not to call them. Compl. ¶¶ 73-75. In some instances, "Clayton, Patrick, Hartnett, and the Festiva Entities" also make telemarketing calls telling consumers they won a prize, to lure them to one of Festiva's lengthy, high pressure sales pitch." Compl. ¶¶ 77-79.[22] The Complaint even provides specific "factual" examples of some of the deceptive pitches Defendants use with consumers. *Id.* at ¶ 80. The Complaint explains why such pitches are deceptive, *id.* at ¶¶ 81-82, and provides many additional "factual" examples of defendants' misconduct. *Id.* at ¶¶ 83-120.

Defendants make several arguments which evidence their misapprehension of the law. For example, defendants argue that "a substantial portion of pages 21-36 [of the Complaint] describes alleged conduct that is simply not illegal," telling the Court "it is not unlawful, under the TCPA or TSR, or otherwise, to supposedly 'disregard due process concerns brought to its attention by arbitration associations and others,'" *see* Def. Mem. at 7 (citing Compl. ¶ 120), "Nor is it unlawful, as another example, to allegedly 'engage [] in high pressure sales presentations . . . or to make 'fast-talking sales pitches.'" *Id.* (citing Compl. ¶¶ 91, 102). Defendants'

[22] Defendants rely on this particular allegation as the sole basis for their argument they are exempt from the TSR because the sales pitch is not completed until a face-to-face sales presentation occurs. While some limited Festiva calls may fall into this category, this is not an accurate statement of the law because the referenced exemption is only a partial exemption. The TSR exemption defendants refer to is only a "partial" exemption, and does not override the TSR's Do-Not-Call provisions. Moreover, 16 C.F.R. § 310.6(b)(3) exempts "[t]elephone calls in which the sale of goods or services . . . is not completed, and payment or authorization of payment is not required, ***until after a face-to-face sales*** . . . presentation by the seller . . . ." (emphasis added). As such, because Festiva often seeks payment from consumers at the time of the initial telemarketing pitch, *see* Compl. ¶ 86 and **[A757-764]**, accepting payment information from the consumer nullifies the exemption.

misapprehension of the law is likely the reason why they now find themselves here. Courts have long condemned business practices which impose or curtail consumers' due process rights. *See, e.g.*, *Spiegel v. FTC*, 540 F.2d 287 (7th Cir. 1976) (condemning catalog companies' burdensome forum selection clause). Similarly, fast-talking salesmen and high pressure sales pitches are the reason why laws like the TSR and TCPA were enacted in the first place. *See, e.g.*, *FTC v. Consumer Health Benefits Ass'n*, No. 10 Civ 3551(ILG)(RLM), 2012 WL 1890242, at * (E.D.N.Y. May 23, 2012) (granting FTC leave to amend complaint to assert claims involving, *inter alia*, high-pressure sales in action brought by FTC under TSR and FTC Act); *FTC v. Ivy Capital, Inc.*, No. 2:11-cv-00283-JCM-GWF, 2012 WL 1883507, at *1 (D. Nev. May 22, 2012) (noting complaint alleged "high pressure sales tactics" in FTC TSR case in context of resolving discovery dispute).[23]

"Although Tennessee courts have not had many opportunities to construe the terms 'unfair' and 'deceptive' under the TCPA, the FTC and the federal courts have developed a substantial and finely honed body of law construing these terms in the context of the FTC Act." *Tucker v. Sierra Builders*, 180 S.W.3d 109, 116 (Tenn. Ct. App. 2005)). "The General Assembly has instructed us to look to the federal understanding of these terms in interpreting them in the TCPA." *Id.* (citing Tenn. Code Ann. § 47–18–115). "The concept of deceptiveness is a broader, more flexible standard of actionable merchant misconduct than the traditional remedy of common-law fraud." *Id.* "A deceptive act or practice is one that causes or tends to cause a consumer to believe what is false or that misleads or tends to mislead a consumer as to

[23] *See also SEC v. Wolfson*, 539 F.3d 1249, 1253 n.6 (10th Cir. 2008) (noting that in securities parlance, "[a] broker using so-called 'boiler room tactics' generally gives customers a high-pressure sales pitch containing misleading information"); *Wyndham Vacation Resorts, Inc. v. Consulting Grp.*, No. 2:12-cv-00096, 2013 WL 3834047, at *3-5 (M.D. Tenn. July 23, 2013) (permitting amendment to include conduct involving, *inter alia*, high-pressure sales tactics, as stating plausible claim under TCPA); *Dayton v. State*, 813 N.E.2d 707, 740 (Ohio Ct. App. 2004) (noting Home Owners Equity Protection Act was enacted to ensure consumers "are protected from high pressure sales tactics"). Indeed, the concept of "unfair or deceptive" trade practices enables an enforcement authority "to take action against unfair practices that have not yet been contemplated by more specific laws." *FTC v Accusearch*, 570 F.3d 1187, 1194 (10th Cir. 2009) (citing *Spiegel*, 540 F.2d at 291-94).

a matter of fact." *Id.* "Thus, for the purposes of the TCPA and other little FTC acts, the essence of deception is misleading consumers by a merchant's statements, silence, or actions." *Id.*

"The concept of unfairness is even broader than the concept of deceptiveness, and it applies to various abusive business practices that are not necessarily deceptive." *Id.* "[A]n act or practice should not be deemed unfair 'unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.'" *Id.* at 116-17 (citing 15 U.S.C.A. § 45(n)).

> To be considered 'substantial,' consumer injury must be more than trivial or speculative. Substantial injury usually involves monetary injury or unwarranted health and safety risks. Consumer injury will be considered substantial if a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number of consumers.

Tucker, 180 S.W.3d at 117. Thus, Defendants' alleged misconduct, while not illegal in their view, readily qualifies as unfair or deceptive under the law.

In addition, it should be noted that all Defendants are charged with "assisting and facilitating" the unlawful conduct at issue, including each other's violations of the TSR. *See, e.g.*, Compl. ¶¶ 18-21. The TSR explicitly forbids "assisting" violations:

> It is a deceptive telemarketing act or practice and a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule.

16 C.F.R. § 310.3(b). *See also Consumer Health Benefits Ass'n*, 2012 WL 1890242, at *5-6 (same). "The threshold for what constitutes 'substantial assistance' is low: 'there must be a connection between the assistance provided and the resulting violations of the core provisions of the TSR.'" *Id.* (citing *United States v. Dish Network, L.L.C.*, 667 F. Supp. 2d 952, 961 (C.D. Ill. 2009)). Indeed, in *Dish Network*, the mere act of paying dealers to engage in telemarketing that violated TSR, which defendants allegedly knew or consciously avoided knowing, was

deemed to constitute "substantial assistance." *See Dish Network,* 667 F. Supp. 2d at 961. Thus, under this low threshold a defendant is also liable for his role in lending assistance to the actions that underlie the alleged violations of the TSR.

Finally, the State notes that defendants' argument that the State is required to anticipate and affirmatively plead their theoretical "exemption" is not supported in law, as confirmed by the absence of authority on point in defendants' memorandum. Analogous case law confirms that the State is not required to affirmatively plead and explain away a defendant's possible affirmative defenses. *See, e.g.*, *U.S. Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623, 626 (7th Cir. 2003) (district court erred in dismissing complaint on grounds of an affirmative defense which did not appear on the face of the complaint). Defendants' "exemption" pleading argument should therefore be rejected.

II. Fed. R. Civ. P. 9(b) Does Not Apply to Remedial Consumer Protection Claims Brought Under the TCPA or TSR

The TCPA is not fraud by another name

In *Ferrell v. Addington Oil Corp.*, No. 2:08-CV-74, 2010 WL 3283029, at *8-9 (E.D. Tenn. Aug. 18, 2010), this Court rejected the notion that Rule 9(b) applies to claims brought under the TCPA. Notably, the Court recognized that "the TCPA is explicitly remedial, and courts are therefore required to construe it liberally to protect consumers in Tennessee and elsewhere." *Id.* at *9 (citing *Tucker*, 180 S.W.3d at 115). In reaching its conclusion in *Ferrell*, this Court provided a detailed analysis of *Tucker,* which continues to be the one of the very few Tennessee cases that has analyzed the nature of the TCPA as it relates to the tort of common-law fraud:

> The scope of the TCPA is much broader than that of common-law fraud. Under the TCPA, a consumer can obtain recovery without having to meet the burden of proof that is required in common-law fraud cases, and the numerous defenses that are available to the defendant in a common-law fraud case are simply not available to the defendant in a TCPA case. Misrepresentations that would not be actionable as common-law fraud may nevertheless be actionable under the provisions of the little FTC acts, including the TCPA.

180 S.W.3d at 115 (citations omitted). The Tennessee Court of Appeals has recently rejected a

defendant's assertion that the plaintiff had waived his TCPA claims by failing to plead with particularity. *See D'Alessandro v. Lake Developers, II, LLC.*, No. E2011-01487-COA-R3-CV, 2012 WL 1900543, at *8 n. 5 (Tenn. Ct. App. May 25, 2012). The *D'Alessandro* court reasoned that "[t]he TCPA is much broader in scope than is common-law fraud," and then went on to quote *Tucker* at length on that issue and others. *Id.* at *8-9 (citing *Tucker*, 180 S.W.3d at 115).

The Tennessee Supreme Court has not analyzed the TCPA in relation to the specific tort of fraud, however it has acknowledged that statutes like the TCPA were passed to rectify shortcomings in the common law:

> The [FTC] Act and other consumer protection laws were passed as a response to the inability of the common-law tort system to protect consumers in many everyday circumstances. While the traditional rule of caveat emptor was deemed sufficient to mete out justice in a world where consumers and merchants were on relatively equal footing, the development of sellers into larger entities called the justice of this approach into question.

Fayne v. Vincent, 301 S.W.3d 162, 172 (Tenn. 2009) (citing Dee Pridgen, *Consumer Protection and the Law* § 1:1, at 1-1 to 1-2 (2002)). The *Tucker* court agreed, clarifying that:

> The TCPA was not intended to be a codification of the common law. To the contrary, one of the express purposes of the TCPA is to provide additional, supplementary state law remedies to consumers victimized by unfair or deceptive business acts or practices that were committed in Tennessee in whole or in part.

180 S.W.3d at 115 (citing Tenn. Code Ann. §§ 47-18-102(2), (4), -112). It is significant, then, that the TCPA does not share the common law elements of fraud. "[A]n act need not be knowing or intentional to be considered deceptive for the purpose of the [TCPA] . . . ,"*Fayne*, 301 S.W.3d at 177, and this conclusion is "bolstered by the federal courts' interpretation of Section 5(a)(1) of the [FTC Act] . . . ." *Id. See also Smith v. Scott Lewis Chevrolet, Inc.*, 843 S.W.2d 9, 12 (Tenn. Ct. App. 1992) ("[A]n unfair or deceptive act need not be willful or knowingly made to recover actual damages under the [TCPA]."). Reliance is also not an essential element of a TCPA claim. *See SecurAmerica Business Credit v. Schledwitz*, No. W2012-02605-COA-R3-CV, 2014 WL 1266121, at *24 (Tenn. Ct. App. Mar. 28, 2014); *see also*

Messer Griesheim Indus., Inc. v. Cryotech of Kingsport, Inc., 131 S.W.3d 457, 469 (Tenn. Ct. App. 2003) (holding that "in TCPA cases involving misrepresentation, a plaintiff is not required to show reliance upon a misrepresentation in order to maintain a cause of action").

It is true, however, that a line of Tennessee cases ostensibly stands for the proposition that Rule 9(b) applies to TCPA claims, but a review of these cases shows that none stated the proposition in more than a conclusory fashion, and that all of them can be traced back to a single misapplication of the law in *Humphries v. West End Terrace, Inc.*, 795 S.W.2d 128 (Tenn. Ct. App. 1990).

In *Humphries*, the plaintiff homeowners sued the developers of a condominium complex under the TCPA stating that the developers misrepresented the complex's underlying indebtedness, which made the condominium units unmarketable. *Id.* at 130. After describing the plaintiffs' TCPA claim, the *Humphries* court stated, "There are no allegations setting forth any particular fraudulent or deceptive act on the part of any agent or employee of [the developer]. The circumstances constituting fraud must be stated with particularity." *Id.* at 132 (citing only to Tenn. R. Civ. P. 9.02 and *Hampton v. Tenn. Bd. of Law Exam'rs*, 770 S.W.2d 755, 765 (Tenn. Ct. App. 1988)). The *Humphries* court then dismissed plaintiffs' TCPA claim. *Id.* No further analysis of any kind was provided by the *Humphries* court as to why it was appropriate to apply the heightened pleading standard of Rule 9.02 to a remedial statute like the TCPA. Tenn. R. Civ. P. 9.02 provides "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." The only case cited by the *Humphries* court to support its statement was *Hampton*, which was not a TCPA case at all, but a civil rights case that included common-law fraud allegations.

For nine years, the *Humphries* court's application of Rule 9.02 to the TCPA sat ignored, until a consumer sued Ford Motor Credit Company alleging TCPA violations. *Harvey v. Ford Motor Credit Co.*, 8 S.W.3d 273, 274 (Tenn. Ct. App. 1999). The trial court dismissed the

complaint for failure to plead with particularity under Rule 9.02. *Id.* at 275. The Tennessee Court of Appeals affirmed stating:

> Rule 9.02 requires that the circumstances constituting fraud must be plead with particularity. The parties dispute whether this requirement applies to claims under the T.C.P.A. This Court has applied Rule 9.02 to claims under the T.C.P.A.

Id. Other than citing to *Humphries* and an Illinois case,[24] the court conducted no further analysis as to why such an application was appropriate.

Unfortunately, the *Harvey* decision was not ignored, and even caused a "re-discovery" of the *Humphries* decision, as virtually every Tennessee case applying Rule 9(b) or Rule 9.02 to the TCPA, including those cited by Defendants, makes the application with only conclusory statements supported either directly by *Harvey* or *Humphries* or their progeny. *See, e.g. LeBlanc v. Bank of America*, No. 2:13-cv-02001-JPM-tmp, 2013 WL 3146829, at *6 (W.D. Tenn. June 18, 2013) (stating "TCPA claims are subject to the higher pleading standard articulated in Rule 9(b)" and citing only *Harvey* and cases that are supported by *Harvey* or *Humphries*); *Metro. Prop. & Cas. Ins. Co. v. Bell*, No. 04-5965, 2005 U.S. App. LEXIS 17825, at *16 (6th Cir. Aug. 17, 2005) (entire analysis consisted of one sentence stating "[b]ecause allegations of fraud must be pleaded with specificity, *see, e.g.*, Fed. R. Civ. P. 9(b), because that requirement applies to allegations of unfair and deceptive acts under § 47-18-109, *see* [*Harvey*], and because Bell has not satisfied this pleading requirement, this claim also fails. . . ."); *Sony/ATV Music Publ'g LLC v. D.J. Miller Music Distribs., Inc.*, No. 3:09-cv-01098, 2011 U.S. Dist. LEXIS 116158, at *28 (M.D. Tenn. Oct. 7, 2011) (stating that TCPA claims must meet the heightened pleading standard, providing no analysis why, but supporting the statement by citing only to *Harvey*, *Humphries*, and cases that are supported by *Harvey* or *Humphries*). Defendants only support their claim that

[24] Intent that a consumer rely on the deception is an element of Illinois' consumer protection act. *See* 815 Ill. Comp. Stat. 505/2; *see e.g. Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 593 (Ill. 1996). This suggests a different analysis than would exist in Tennessee where intent is not an element of the TCPA. *See Fayne*, 301 S.W.3d at 177; *Scott Lewis Chevrolet*, 843 S.W.2d at 12.

Rule 9(b) applies to the TCPA by citing to *LeBlanc*, *Bell*, and *Sony/ATV*.[25] Defendants can point to no case that provides any true analysis why it is appropriate to apply the pleading requirements for common-law fraud to the TCPA, which was not intended to codify the common law, *see Tucker*, 180 S.W.3d at 115, is remedial in nature, *id.*, and which courts are required to construe liberally in favor of plaintiffs. *See Ferrell*, 2010 WL 3283029, at *9.

Rule 9(b) Should Not Be Applied Reflexively

Courts reject summary assertions that Rule 9(b) "applies" absent reasoning or analysis. *FTC v. Wyndham Worldwide Corp.*, __ F. Supp. __, 2014 WL 1349019, at *21 (D.N.J. Apr. 7, 2014) ("Indeed, [Defendants] summarily assert[] that the FTC's claim 'sounds in fraud,' without any reasoning or analysis."); *FTC v Medical Billers Network, Inc.*, 543 F. Supp. 2d 283, 314-15 (S.D.N.Y. 2008) ("Nor do Defendants explain why the pleading requirements of Rule 9(b) should apply to this action.").

Legal scholars have noted that Rule 9(b) "probably originated in equity pleading and reflected a reluctance to upset or investigate judgments, settled accounts and other completed transactions." William M. Richman, et al., *The Pleading of Fraud: Rhymes without a Reason*, 60 S. Cal. L. Rev. 959, 967 (May 1987). Before the merger of law and equity, fraud and mistake could not be asserted as an equitable defense to an action at law. *Id.* at 966. Because the litigant had to sue at equity to enjoin enforcement of the law court's judgment, equity courts required fraud to be pled with particularity in these cases. *Id*. The authors hypothesize that the particularity requirement's "purpose was tied closely to the reluctance to question settled transactions." *Id.* at 967. After law and equity were united:

> [T]he courts perhaps were seduced by the fact that a common law action for fraud and an equitable action to overturn a judgment for fraud both wore the same label-"fraud"-and thus they merely transferred the particularity requirement to the common law tort

[25] Defendants cite *Marshall v. ITT Technical Inst.*, No. 3:11-CV-552, 2012 WL 1565453 (E.D. Tenn. Apr. 11, 2012) to support the statement that, "It is clear that TCPA claims in particular are subject to the heightened pleadings requirements of Rule 9(b)." Def. Mem. at 26. However *Marshall* involves the enforcement of arbitration clauses and does not involve the issue of Rule 9(b) at all.

> action. Because the original motivating policy no longer fit, new purposes were articulated and adopted. However, the continuing relationship between fraud and particularized pleading, as argued below, has become more reflex than logic.

Id. at 967–68. A New York court agreed that logic, rather than reflex, should prevail when it refused to apply Rule 9(b) to a federal statutory claim of false advertising because, "nothing in the language or history of Rule 9(b) suggests that it is intended to apply, willy-nilly, to every statutory tort that includes an element of false statement." *John P. Villano, Inc. v. CBS, Inc.*, 176 F.R.D. 130, 131 (S.D.N.Y. 1997).

The tendency to reflexively apply Rule 9(b) to consumer protection statutes was rejected by one court in Delaware, even though, as in Tennessee, other cases in that jurisdiction had previously applied fraud's heightened pleading standard to Delaware's consumer protection statutes. *See State v. Publishers Clearing House*, 787 A.2d 111,115 (Del. Ch. 2001). In that state enforcement action, the court stated:

> I recognize . . . that other cases have applied Superior Court Rule 9(b)'s pleading standard to suits brought under the [state consumer protection statutes]. Nevertheless, those cases did so without any explicit analysis of whether or not it was the proper standard to apply. For this reason, I do not regard those cases as authoritative on the question here presented. Moreover, neither the Delaware Supreme Court nor the General Assembly has spoken directly on the issue. Thus, I will treat it as one of first impression.

Id. This Court, recognizing that the *Tucker* case provided explicit analysis of the relationship between fraud and the TCPA, similarly rejected the application of the heightened pleadings requirements of Rule 9(b) to the TCPA. *See Ferrell*, 2010 WL 3283029, at *9.

Defendants incorrectly cite to *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 247 (6th Cir. 2012), for the proposition that "[w]hen a state-law claim sounds in fraud, it triggers Rule 9(b)'s heightened standards." Def. Mem. at 25-26. The exact quote on the page cited actually stands for the long-held proposition that "[*w*]*hether* a state-law claim sounds in fraud, and so triggers Rule 9(b)'s heightened standard, is a matter of substantive state law, on which we must defer to the state courts." *Id.* (citing *Erie R.R. v. Tompkins*, 304 U.S. 64, 78

(1938)) (emphasis added). The *Republic Bank & Trust* court then engages in a thorough analysis of whether common law negligent misrepresentation in Kentucky requires heightened pleading and finds that it does. *Id.* at 247-48. In Tennessee, the courts have made it clear that part of the substantive TCPA analysis includes looking to FTC cases and federal courts, because "[t]he TCPA is "to be construed consistently with the FTC and federal courts' interpretations of the [FTC] Act." *Fayne*, 301 S.W.3d 172 (Tenn. 2009) (citing Tenn. Code Ann. § 47-18-115); *see also Tucker*, 180 S.W.3d at 114-15 ("The TCPA, like the little FTC acts of many other states, provides that it is to be interpreted and construed in accordance with interpretations of 15 U.S.C.A. § 45(a)(1) by the [FTC] and the federal courts.").

When interpreting the FTC Act, many courts, including one in this District, have explicitly ruled that Rule 9(b)'s heightened pleading standard does not apply to FTC § 5 cases. *See, e.g.*, *FTC v. Nat'l Testing Servs., LLC*, No. 3:05–0613, 2005 WL 2000634, at *2 (M.D. Tenn. Aug. 18, 2005) (holding that Rule 9(b) does not apply to Section 5(a) claims because neither intent to deceive, proof of consumer reliance, nor proof of consumer injury are necessary elements); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1203 n.7 (10th Cir. 2005) ("A § 5 claim simply is not a claim of fraud as that term is commonly understood or as contemplated by Rule 9(b), and the district court's inclination to treat it as such unduly hindered the FTC's ability to present its case."); *FTC v. Communidyne, Inc.*, No. 93 C 6043, 1993 WL 558754, at *2 (N.D. Ill. Dec. 3, 1993) (holding that, because it has no scienter requirement, "A claim under section 5(a) of the FTC Act is not a claim of fraud or mistake, so Rule 9(b) does not apply."); *FTC v. Skybiz.com, Inc.*, No. 01–CV–396–K(E), 2001 WL 1673649, at *4 (N.D. Okla. Aug. 2, 2001) (holding that Rule 9(b) does not apply to § 5(a) claim); *FTC v. Innovative Mktg., Inc.*, 654 F. Supp.2d 378, 388 (D. Md. 2009) ("Indeed, Defendant seems to argue for a pleading standard akin to the particularity requirement prescribed for claims of fraud under Fed.R.Civ.P. 9(b)—a heightened standard that does not apply [sic] section 5(a) claims under the FTC Act."); *FTC v. Tax Club, Inc.*, __ F. Supp.2d __, 2014 WL 199514, at *6 (S.D.N.Y. Jan. 17, 2014) ("[T]he heightened pleading requirements of .

. . Rule 9(b) do[] not apply to claims brought under the FTC Act.").[26]

Rule 9(b) Does Not Apply to the TSR

Most courts that have directly addressed the issue, have found that claims under the TSR are not subject to heightened pleading standards. *See, e.g.*, *FTC v. Sterling Precious Metals, LLC*, No. 12–80597, 2013 WL 595713, at *3 n.4 (S.D. Fla. Feb. 15, 2013) ("[T]he Court finds that the FTC's [§ 5 and TSR] claims are not held to the heightened pleading requirements of Rule 9(b) . . . ."); *Consumer Health Benefits Ass'n*, 2012 WL 1890242, at *6–7 (even though court did not need to reach the issue, it still stated that heightened pleading standards did not apply to claims under the state's consumer protection law, the FTC Act, and the TSR), *FTC v. AFD Advisors, LLC*, No. 13 CV 6420, 2014 WL 274097, at *2 (N.D. Ill. Jan. 24, 2014) ("[B]ecause neither fraud nor mistake is an element of deceptive conduct under the FTC Act and the TSR, allegations that provide notice under the relaxed pleading standard of Rule 8 are sufficient."). *But see Ivy Capital*, 2011 WL 2118626, at *2-4. Defendant cites only to *State v. Lexington Law Firms*, No. 3:96-0344, 1997 U.S. Dist. LEXIS 7403, at * 5-6 (M.D. Tenn. May 14, 1997), for the proposition that, "a district court in this state has specifically held that violations of 16 C.F.R. § 310.3 sound in fraud and therefore claims brought thereunder are subject to Rule 9(b)." Def. Mem. at 27. Defendants' proposition is, however, unsupported by the text of the case:

> Defendant contends that the gravamen of [the TSR claim] is that Defendant committed fraud in the course of telemarketing its services, but that Plaintiff has failed to plead the circumstances of said fraud with particularity, as is required by [Rule 9(b)]. . . . In response to Defendant's assertion, Plaintiff has moved to amend its complaint to include more specific allegations of fraud, and has submitted a proposed amended complaint.

[26] Other courts have found that Rule 9(b) does apply. *See, e.g., Ivy Capital*, 2011 WL 2118626, at *2-4 (finding that heightened pleading was required under § 5 of the FTC Act because the elements for a violation of the FTC Act were analogous to the elements for a violation of the common law tort of negligent misrepresentation, which the Ninth Circuit had held required heightened pleading); *FTC v. Lights of Am., Inc.*, 760 F. Supp. 2d 848, 852–54 (C.D. Cal. 2010) (finding that finding that heightened pleading was required under § 5 of the FTC Act because "well-established Ninth Circuit law provid[ed] that, even where a claim does not include all of the elements of a claim for fraud, it is subject to the heightened pleading requirements of Rule 9(b) if it "sound[s] in fraud." (alteration in original) (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003)).

Id. at *4. Citing Fed. R. Civ. P. 15(a), the court then grants the state's motion to amend and then engages in an analysis of whether the amended complaint meets the 9(b) standard. *Lexington Law Firms*, 1997 U.S. Dist. LEXIS 7403, at * 5-7. Nowhere does the court "specifically hold," much less analyze, that Rule 9(b) is the correct standard to apply; it simply grants the state's motion to amend its complaint *without* making any determination as to the proper pleading standard.

In sum, the TCPA and the TSR are not fraud laws and do not share the elements of common-law fraud. Leading consumer protection authority that has addressed the question of whether Rule 9(b) applies to consumer protection claims has rejected the notion because it "seems unnecessarily restrictive in light of the liberal construction required of [such] statutes and the clear distinction between [such] statutes and common law fraud." J. Sheldon, *National Consumer Law Center, Unfair and Deceptive Acts and Practices*, § 7.8.5 at 497-98 (6th ed. 2004). The TCPA originated from unfair competition law, vis-a-vis the FTC Act, and is not a codification of common-law fraud. To the extent some Tennessee cases have incorrectly stated Rule 9(b)'s particularity requirements apply in TCPA cases, these courts did not analyze this issue in depth, but simply reached their holdings based on erroneous assumptions. For these reasons, the State respectfully submits that if the Court reaches this question, this Court should find that Rule 9(b) does not apply to TCPA claims nor to TSR claims because the TCPA and the TSR are not a fraud laws.

The State's Complaint Nevertheless Meets the Rule 9(b) Pleading Standard

If the court nevertheless finds that the State's TCPA and TSR claims are subject to the heightened pleadings standards of Rule 9(b), the State submits that its Complaint meets those standards. The Sixth Circuit has held that "[i]n ruling upon a motion to dismiss under Rule 9(b) for failure to plead fraud 'with particularity,' a court must factor in the policy of simplicity in pleading which the drafters of the Federal Rules codified in Rule 8." *Michaels Bldg. Co. v.*

Ameritrust Co., 848 F.2d 674, 679 (6th Cir. 1988); *see, e.g., United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.* (*Bledsoe II*), 501 F.3d 493, 503 (6th Cir. 2008); *United States v. Smith & Nephew, Inc.*, 749 F. Supp. 2d 773, 784, (W.D. Tenn. 2010); *see generally* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1298 (3d ed. 2004).

Focusing exclusively on Rule9(b)'s particularity requirements is "inappropriate." *Michaels Bldg. Co.*, 848 F.2d at 679. Moreover, leading authority has provided:

> This is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the federal rules and the many cases construing them; in a sense, therefore, the rule regarding the pleading of fraud does not require absolute particularity or a recital of the evidence, especially when some matters are beyond the knowledge of the pleader and can only be developed through discovery.

Wright & Miller, *supra*, § 1298; s*ee e.g. Michaels Bldg. Co.*, 848 F.2d at 679; *Bledsoe II*, 501 F.3d at 504 ("Essentially, [a complaint] should provide fair notice to Defendants and enable them to 'prepare an informed pleading responsive to the specific allegations of fraud.'") (internal quotation omitted); *see also United States ex rel. Pogue v. American Healthcorp, Inc.*, 977 F. Supp. 1329, 1332 (M.D. Tenn. 1997) ("The overarching purpose of Rule 9(b) is to provide a defendant with fair notice of the claims against him, in order that he may prepare an adequate responsive pleading."). In general, for fraud claims, "[a] complaint is sufficient under Rule 9(b) if it alleges 'the time, place, and content of the alleged misrepresentation on which [the deceived party] relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud.'"[27] *Bledsoe II*, 501 F.3d at 509 (citing *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.* (*Bledsoe I*), 342 F.3d 634, 643 (6th Cir. 2003)); *see e.g. United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 518 (6th Cir. 2009); *Shipwash v. United Airlines, Inc.*, __F. Supp. 2d__, No. 3:13-CV-654-TAV-HBG, 2014 WL 2768692, at *7 (E.D. Tenn. June 18, 2014).

[27] Defendants incorrectly attribute a slightly different version of this standard ("time, place and contents of the false representations, as well as the identity of the person making the representation and what [that person] obtained thereby") to *Republic Bank & Trust Co.*, 683 F.3d at 247. The quoted sentence, however, appears nowhere in that case.

"[A]n exception to the particularity requirement of Fed. R. Civ. P. 9(b) exists when the relevant facts 'lie exclusively within the knowledge and control of the opposing party.'" *Beard v. Worldwide Mortg. Corp.*, 354 F. Supp. 2d 789, 799 (W.D. Tenn. 2005) (citing *Wilkins ex rel. United States v. State of Ohio,* 885 F. Supp. 1055, 1061 (S.D. Ohio 1995); *see e.g. United States ex rel. Russell v. Epic Healthcare Mgmt. Grp.*, 193 F.3d 304, 308 (5th Cir. 1999) (when facts relating to alleged fraud are peculiarly within perpetrator's knowledge, Fed. R. Civ. P. 9(b) standard is relaxed, and fraud may be pleaded on information and belief, provided plaintiff sets forth factual basis for belief). In addition, courts may relax Rule 9(b)'s particularity requirements in corporate fraud cases:

> Defendants . . . object to the FTC's "lumping" the defendants together in the complaint and the FTC's failure to "individualize" specific factual allegations against each defendant. Contrary to this argument, the complaint actually goes to great lengths to categorize defendants based on their function in the alleged scheme. Furthermore, the complaint describes the nature of the scheme in sufficient detail. Under the *Moore* pleading standard, in corporate fraud cases, the complaint need only include the roles of individual defendants, where possible, because such situations make it difficult to attribute particular conduct to each defendant. Therefore, the Court disagrees with Defendants and finds that the complaint does give the defendants fair and meaningful notice of the legally cognizable claims and the factual allegations on which they rest.

FTC v. AMG Servs., No. 2:12-CV-00536-GMN-VCF, 2012 WL 6800778, at *5 (D. Nev. Dec. 28, 2012) (citing *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 540 (9th Cir. 1989)); *see also Bledsoe II*, 501 F.3d at 508 ("[T]he presence or absence of allegations naming specific employees of a corporate defendant is *relevant* to whether the plaintiff stated the circumstances of fraud with particularity; it does not support the more radical proposition that this information is *necessary* for Rule 9(b) to be satisfied.").

Defendants state that the State "failed" to identify, "even generally . . . the time and place misrepresentations were made, what Defendants gained as a result of the misrepresentations, how Plaintiff (or the consumers it purports to represent) were [sic] injured as a result of those representations, and . . . who made the representations." Def. Mem. at 27. Assuming *arguendo* that these elements are all required to state a claim under the TCPA and

the TSR, the State has pled them all with the sufficient particularity to satisfy Rule 9(b). In the present case, information such as *exactly* how much money Defendants gained from their misconduct, the names of the *specific* employees who contacted consumers and the dates of those contacts, records of consumer attendance at sales pitches, recordings of telemarketing calls, and the dates and amounts of charges to consumers accounts for promotions, purchases, and fees are all within the control of Defendants, and could thus fall under the exception described above. The exception is unnecessary however, because Rule 9(b) does not require such exactness and specificity. It requires that "circumstances" be pled, not evidence:

> In their insistence upon plaintiffs' [sic] producing the actual names of favored borrowers, defendants border on urging that Rule 9(b) requires that plaintiff plead the *evidence* of the fraud. The rule, however, requires only that the "circumstances" of the fraud be pled with particularity, not the evidence of the case. While "circumstances" may consist of evidence, the rule does not mandate the presentation of facts and evidence in a complaint.

Michaels Bldg. Co., 848 F.2d at 680 n.9. *See also In re Sirrom Capital Corp. Sec. Litig.*, 84 F. Supp. 2d 933, 939 (M.D. Tenn. 1999) ("Rule 9(b) does not require plaintiffs to plead detailed evidentiary matters."). An averment that "defendants . . . actively practiced fraud upon the plaintiffs' is purely conclusory." *Coffey v. Foamex L.P.*, 2 F.3d 157, 162 (6th Cir. 1993) (quoting plaintiff's complaint). In the present case, however, the State has alleged a number of specific acts that constitute unfairness and deception, *see* Compl. ¶¶ 73-120, not just that "defendants practiced unfairness and deception." One court helpfully provided an in-depth analysis of a complaint that met the standard of Rule 9(b):

> Here, the FTC has met the pleading standard of Rule 9(b). The twenty-two page complaint identifies several defendant entities and individuals (*id*. at ¶¶ 6–16), categorizes those defendants based on their function in the alleged scheme (*id*. at ¶¶ 18–23, 36, 83), and includes specific representations allegedly made by defendants (*id*. at ¶¶ 24–26). The complaint thoroughly describes the nature of the scheme, and how it was carried out. Specifically, the complaint alleges that defendants "operate a tangled network of telemarketing companies and telemarketing service providers that . . . deceptively telemarket credit card interest rate reduction services and provide substantial assistance to third parties who deceptively telemarket such services [sic].

FTC v. ELH Consulting, LLC, No. CV 12-02246-PHX-FJM, 2013 WL 4759267, at *2 (D. Ariz.

Sept. 4, 2013) (citations to the record omitted). In the present case, the State's 48-page Complaint identifies several Festiva entities and individuals, Compl. ¶¶ 7-21, categorizes Defendants based on their function in the alleged scheme, Compl. ¶¶ 29-63, includes specific actions or representations allegedly taken or made by Defendants, Compl. ¶¶ 73-120, and thoroughly describes the nature of the scheme and how it is carried out, Compl. ¶¶ 55-120.

Finally, "[c]ourts . . . are more lenient in those situations where the alleged fraud did not occur at a discrete time and place and instead "the transactions involved are complex or cover a long period of time." *Smith & Nephew*, 749 F. Supp. 2d at 784; s*ee e.g. Bledsoe II*, 501 F.3d at 509-510; *Am. Healthcorp*, 977 F. Supp. at 1333 (finding that plaintiff's complaint meets Fed. R. Civ. P. 9(b)'s heightened pleading requirements "[a]lthough no specific dates or [defendant] West Paces employees are identified, the complaint alleges that the hospital participated in a systematic, fraudulent scheme, spanning the course of twelve years; thus, reference to a time frame and to 'West Paces' generally is sufficient."); ***Loew's Inc. v. Makinson***, 10 F.R.D. 36 (N.D. Ohio 1950) ("Perhaps, if only one fraudulent act were involved, more details as to time and place would be required but in these actions such detail would unduly lengthen the complaints in violation of [Fed. R. Civ. P. 8(a)].");Wright & Miller, *supra*, § 1298 ("The sufficiency of a fraud pleading also varies with the complexity of the transaction in question in the litigation."); Tracy Bateman Farrell, et al., *Federal Procedure, Lawyers Edition* § 62:145 (updated June 2014) ("The fact that a complaint encompasses multiple events or transactions occurring over an extended period of time may justify some leniency as to the particularity requirement and necessitate that the pleading be general in some respects, especially considering the requirement that pleadings be short, plain, and concise." (citations omitted)). Even without applying this exception, the allegations in the State's Complaint describe specific unfair and deceptive acts Defendants used since at least 2006 to market and sell their increasingly complex products, Compl. ¶¶ 73-120, which is sufficient to meet the requirements of Rule 9(b).

III. No Basis for Dismissal Exists Under the Tenn. Code Ann. § 47-18-108(a)(2) 10-Day Notice Provision

Tenn. Code Ann. § 47-18-108(a)(2) provides that:

> Unless the [Division of Consumer Affairs] determines in writing that the purposes [the TCPA] will be substantially impaired by delay in instituting legal proceedings, it shall, at least ten (10) days before instituting legal proceedings as provided for in [Tenn. Code Ann. § 47-18-108], give notice to the person against whom proceedings are contemplated and give such person an opportunity to present reasons why such proceedings should not be instituted.

Moving Defendants and Moving Relief Defendants ask that the "TCPA claims in particular be dismissed as to all Moving Relief Defendants and six of the Moving Defendants because Plaintiff failed to provide them the ten-day notice required by Tenn. Code Ann. § 47-18-108(b) [sic]." Def. Mem. at 30. As to all Moving Defendants, the State has fully complied with the notice provisions of the TCPA, either through providing the 10-Day Letter to certain Moving Defendants or through exercising the exception to the notice provision. Regardless, the notice provision and the purpose behind the provision, were satisfied because Defendants had plenty of notice and opportunity to confer with the State before the State filed this action.

At the request of the Division of Consumer Affairs, on March 7, 2013, the Attorney General's Office issued 10-Day Letters to Moving Defendants Festiva Real Estate Holdings, LLC, Resort Travel & Xchange, LLC, Zealandia Holding Co., Festiva Resorts Adventure Club Members' Association, Inc., Festiva Development Group, LCC, Patrick, and Clayton. In response to the 10-Day Letters, Defendants' counsel and the State conducted several phone calls and an in-person meeting to discuss the State's concerns. The State then issued pre-filing subpoenas to fourteen entities,[28] and three individuals[29] that the State had reason to believe were violating the

[28] Festiva Adventure Club, Festiva Development Group, LLC, Festiva Hospitality Group, Inc., Festiva Real Estate Holdings, LLC, Festiva Resorts, LLC, Festiva Resorts Adventure Club Members' Association, Inc., Festiva Travel & Xchange, FTX, Patton Hospitality Management, LLC, Resort Travel & Xchange, LLC, RTX, SETI Marketing, Inc., Zealandia Capital, Inc., and Zealandia Holding Company, Inc.
[29] Patrick, Clayton, and Hartnett.

TCPA. The pre-filing subpoenas spurred several rounds of correspondence between Defendants' counsel and the State, wherein the parties exchanged some limited information. The Defendants who received the investigative subpoenas petitioned for a protective order in Davidson County Chancery Court on August 12, 2013. After several rounds of briefing and negotiation, the Defendants agreed to comply with the subpoenas, with some negotiated modifications. The Defendants proffered their responsive information on December 6, 2013. The responses were, at best, inadequate and non-compliant with the subpoenas, and, at worst, actively concealing information about the Festiva corporate structure, and corporate acquisitions.

On December 11, 2013, the Division of Consumer Affairs, through its Acting Director, Steve Majchrzak, determined in writing that delay in initiating proceedings against Escapes!, Inc., Escapes Travel Choices, LLC, Etourandtravel, Inc., Festiva Resorts Adventure Club Members' Association, Inc., Human Capital Solutions, Inc., Patton Hospitality Management, LLC, Zealandia Capital, Inc., and Richard Allen Hartnett would substantially impair the purpose of the TCPA. See Decl. of Steve Majchrzak Pursuant to 28 U.S.C. § 1746 attached as **[A25-26]**.

Therefore, as to all Moving Defendants, the State has fully complied with the notice provisions of the TCPA, either through providing the 10-Day Letter or through the exception to the notice provision. Moving Relief Defendants request that the TCPA claims against them be dismissed for failure to provide the proper notice, but because the State did not bring any TCPA claims against Moving Relief Defendants, there is nothing for the Court to dismiss.

While Defendants are correct that Tennessee courts have not addressed the TCPA's notice provision, *see* Def. Mem. at 30, Defendants' reliance on analyzing lawsuits between private parties to argue its position is once again misplaced. The TCPA does not require that private litigants provide notice before filing suit, s*ee* Tenn. Code Ann. § 47-18-109, and cases that deal only with pre-suit notice provisions for private litigants have a very different function

and purpose than in the law enforcement context.[30]

The state enforcement notice provision in Tenn. Code Ann. § 47-18-108 concerns state law enforcement proceedings. The provision does not require that the notice take any particular format and, indeed, "state attorneys general are . . . given a great deal of judicial leeway in filing their required notices under the consumer protection statutes." Dee Pridgen & Richard M. Alderman, *Consumer Protection and the Law* § 5:3 (2013) (citing *Kirk v. State*, 651 S.W.2d 840, 846 (Tex. Ct. App. 1983) (notice requirement was satisfied when state investigators notified one of the two defendants that their joint investment program was being investigated)). In addition, at least one court has found that providing notice and opportunity to the corporation also meets the notice-and-opportunity provision for the corporate officers in their official and personal capacities. *See Quality Carpet Co. v. Brown*, No. 76CV-08-3308, 1977 Ohio Misc. LEXIS 125, at *6-9 (Ohio June 20, 1977) (finding that Ohio's consumer protection act did not require that all officers and employees of a corporation be included in the notice and opportunity for a voluntary compliance because the result of such "would be a pointless burden upon the Attorney General, making effective enforcement of the Consumer Sales Practices Act extremely difficult, if not impossible." *Id.* at *8-9); *see also State v. Master Distributors, Inc.*, 615 P.2d 116, 127 (Idaho 1980) (finding the defendants, which included a distribution company that sold water conditioners, that company's owners, and the manufacturer of the water distributors, had an agency by estoppel relationship and therefore the attorney general satisfied the notice provisions of the Idaho consumer protection act when he sued all of the defendants, even though only the distribution company had been offered the notice and

[30] For example, in *Center for Biological Diversity v. Marina Point Development Co.*, 566 F.3d 794, 800 (9th Cir. 2008), the court discussed the reasons the Clean Water Act has a notice provision, stating, "[T]he legislative history indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." This is very different from the "notice-and-opportunity" purposes of state enforcement notices, discussed below.

opportunity to enter into an assurance of voluntary compliance).

States that have more developed caselaw surrounding their consumer protection enforcement action notice provisions focus on whether the purpose of the notice provision was achieved. In other words: was the defendant given the opportunity to dissuade the attorney general from filing suit? The Alabama Supreme Court has also found that the existence of a prior voluntary compliance agreement between the defendants and the state met the requirement that, before filing suit, the state "allow such person a reasonable opportunity to appear before the Attorney General or district attorney and solve the dispute to the parties' satisfaction." *Nunley v. State*, 628 So.2d 619, 621 (Ala. 1993); *see also People v. Apple Health & Sports Clubs, Ltd.*, 599 N.E.2d 683, 685 (N.Y. Ct. App. 1992) (alleged owners of a health club were included in an amended petition by the state attorney general under New York's consumer protection laws; court rejected owners' contention they were denied proper notice and a hearing).

In the present case, by the time the State filed its suit against Defendants in December 2013, a multistate working group of attorneys general had been investigating Defendants and working with them to resolve allegations of consumer protection violations for *years*, and Tennessee had been engaging in significant one-on-one discussions with Festiva and its owners and operators since early March 2013, up to and including the multiple negotiations and discussions that stemmed from the State's investigative subpoenas and Festiva's subsequent Chancery Court proceeding against the State. By the time this action was filed, Festiva and its officers were clearly on notice that the State had reason to believe that Festiva was engaging in a pattern of practice of deceiving and misrepresenting its products to consumers and the Moving Defendants had ample opportunity to discuss the issues involved in this proceeding and to dissuade the Attorney General from filing suit.

Finally, while there are no Tennessee decisions directly on point, at least one state's supreme court has stated that the proper remedy for a state enforcement agency's failure to provide notice under the state's consumer protection act "would be to stay the proceeding to

permit the parties to confer." *State v. Price-Rite Fuel, Inc.*, 24 A.3d 81, 85 (Me. 2011) (ultimately finding that no remedy was necessary because the state had provided the statutorily mandated proof that immediate action was necessary and because opportunity to confer would have been futile due to simultaneous independent action against the defendant by other enforcement agencies).

The State provided 10-Day Letters to seven of the Moving Defendants and exercised the exception to the notice provision for the remaining Moving Defendants, though even without the exception, the remaining Moving Defendants, which, through shared owners and operators, were on notice of the State's investigation into the Festiva enterprise, had ample opportunity to cooperate with the State and dissuade the State from moving forward with this suit.

IV. This Court Has Personal Jurisdiction Over The Five Moving Defendants and Six Moving Relief Defendants

Under Fed. R. Civ. P. 12(b)(2), "[a] plaintiff bears the burden of establishing the existence of personal jurisdiction." *Adkins v. Chevron Corp.*, 960 F. Supp. at 764 (citing *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 360 (6th Cir. 2008)). *See also Brunner v. Hampson*, 441 F.3d 457, 462 (6th Cir.2006). Here, the State readily meets this burden because certain Rule 12(b)(2) Moving Defendants previously waived or consented to jurisdiction in Tennessee, and as to the rest, the Complaint adequately alleges facts establishing that all defendants have sufficient minimum contacts with Tennessee under the Tennessee long-arm statute by engaging in unlawful conduct related to the cause of actions in the Complaint, and by purposefully availing themselves of the privileges of doing business in Tennessee either directly, or indirectly, as agents of one another, acting in concert or as a common enterprise. The Rule 12(b)(2) motion to dismiss should therefore be denied.

Clayton, Patrick, Hartnett, and Festiva Hospitality (n/k/a Zealandia Holding Company) Unequivocally Waived or Consented to Jurisdiction in Tennessee

The State need not engage in a general jurisdiction analysis here. But in the case of four defendants, specific jurisdiction need not be reached. Clayton, Patrick, Hartnett, and Festiva

Hospitality (n/k/a Zealandia Holdings Company) unequivocally waived personal jurisdiction when they filed a related action against the Attorney General last year in the Davidson County Chancery Court. *See* Petition for Protective Order, *In re Investigation of Festiva Adventure Club, et al.*, (Davidson Cnty. Ch. Ct. Aug. 12, 2013) **[A69-161]**. When these defendants filed this suit, they made the decision to submit to the jurisdiction of Tennessee's courts in general, and this Court in particular. "[T]here is no better textbook example of a nonresident invoking or availing themselves of the benefits, privileges and protections of the state then a nonresident initiating a lawsuit in a forum state's courts." *Praetorian Specialty Ins. Co. v. Auguillard Constr. Co*., 829 F. Supp. 2d 456, 466 (W.D. La. 2010) (citing cases). Any personal jurisdiction defense they may have once had was extinguished on August 12, 2013.

The United States Supreme Court has long recognized that when a nonresident plaintiff commences an action, he submits to the court's personal jurisdiction on any cross-complaint filed against him by the defendant. *See Adam v. Saenger*, 303 U.S. 59, 67–68 (1938). In particular, the Supreme Court held:

> The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. *It is the price which the state may exact as the condition of opening its courts to the plaintiff.*

Id. (citing *Young Co. v. McNeal-Edwards Co*., 283 U.S. 398, 400 (1931)) (emphasis added). Thus, by choosing a Tennessee forum, Clayton, Patrick, Hartnett, and Festiva Hospitality voluntarily submitted to this Court's jurisdiction "for all purposes for which justice to the [the State] requires [its] presence." *Id*. Personal jurisdiction in this Court "is the price which the [S]tate may exact as the condition of previously opening its courts to [defendants]." *Id*. at 458.

Tennessee courts recognize that "a nonresident corporate defendant may consent to personal jurisdiction by initiating a suit against a citizen of the forum state." *Dalton Trailer Serv., Inc. v. Ardis*, 792 S.W.2d 934, 936 (Tenn. Ct. App. 1990). In *Dalton Trailer Service*, the Court of Appeals affirmed the trial court's decision to refuse to permit a nonresident

corporation to intervene to assert a tort counterclaim in a suit pending against the corporation's principals. *Id.* Notably, the Court of Appeals referred to *Rice v. Sharpleigh Hardware Co.*, 85 F. 559 (W.D. Tenn. 1898), to set forth the legal impact of a nonresident's voluntary appearance in a Tennessee court:

> The voluntary coming of the nonresident debtor within the dominion of Tennessee, and into its court of competent jurisdiction, to enforce his own claim against a citizen of Tennessee, was a voluntary submission by him to the general jurisdiction of the state of Tennessee to compel him to answer whatever claims the debtor he had sued in Tennessee might have against him by way of set-off and recoupment. . . .

Dalton Trailer Serv., 792 S.W.2d at 936 (quoting *Rice*, 85 F. at 569).

The United States Supreme Court has observed that "because the personal jurisdiction is a waivable right, there are a 'variety of legal arrangements' by which a litigant may give 'express or implied consent to the personal jurisdiction of the court.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) (quoting *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)). *See also Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990) ("Consent is [a] traditional basis of jurisdiction, existing independently of long arm statutes."); *Marron v. Whitney Group*, 662 F. Supp. 2d 198, 200 (D. Mass. 2009) ("A defendant can manifest consent in a number of ways: . . . by expressing acquiescence to the forum, or by impliedly submitting to jurisdiction through conduct."). Thus, "consent is an independent basis for asserting personal jurisdiction over a nonresident defendant." *Nobel Farms, Inc. v. Pasero*, 106 Cal. App. 4th 654, 660 (Cal. Ct. App. 2003). "[A] plaintiff consents to personal jurisdiction by virtue of the act of bringing suit in the given forum." *Moore v. Rohm & Haas Co.*, 446 F.3d 643, 645-46 (6th Cir. 2006).

One of the leading cases on the issue of waiving or consenting to personal jurisdiction by filing suit in the same forum is *General Contracting & Trading Co. v. Interpole, Inc.*, 940 F.2d 20 (1st Cir. 1991). In *General Contracting*, a nonresident defendant objected to jurisdiction in a New Hampshire federal court, even though that same nonresident defendant later filed a

related suit in the same New Hampshire federal court. *Id.* at 21. The First Circuit observed that "[a] defendant may manifest consent to a court's *in personam* jurisdiction in any number of ways, from failure seasonably to interpose a jurisdictional defense, to express acquiescence in the prosecution of a cause in a given forum, to submission implied from conduct." *Id.* (citing *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939)). In affirming the trial court's rejection of the nonresident's personal jurisdiction argument, the First Circuit held:

> [I]t seems pellucidly clear that, by bringing Suit No. 2, [the out-of-state corporate defendant] submitted itself to the district court's jurisdiction in Suit No. 1. [The out-of-state corporate defendant] elected to avail itself of the benefits of the New Hampshire courts *as a plaintiff*, starting a suit against Interpole. By doing so, we think it is inevitable that [the out-of-state corporate defendant] surrendered any jurisdictional objections to claims that Interpole wished to assert against it in consequence of the same transaction or arising out of the same nucleus of operative facts.

General Contracting, 940 F.2d at 23. Notably, the First Circuit made the point that the operative forum was "the New Hampshire courts," and a contrary ruling would "produce an unjust asymmetry, allowing a party (here, [the out-of-state corporate defendant]) to enjoy the full benefits of access to a state's courts *qua* plaintiff, while nonetheless retaining immunity from the courts' authority *qua* defendant in respect to claims asserted by the very party it was suing. . . ." *Id.*[31]

Exploiting such an unjust symmetry is precisely what Clayton, Patrick, Hartnett, and

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[31] In *Marron*, the court made a similar point regarding the inequity of permitting a defendant to enjoy the full benefits of a state's courts as a plaintiff, while simultaneously objecting to that forum's jurisdiction as a defendant:

> The choice to sue in Massachusetts state court, or to abstain from doing so, was Mr. Sussman's alone to make. Having made that choice, he has waived his jurisdictional defense to the Third–Party complaint in the instant action, the pertinent facts of which arise from the same series of transactions that underlie the state action. Mr. Sussman can claim no unfairness based upon this court's exercise of jurisdiction over him, since one who enjoys the full benefits of access to a forum's courts as plaintiff may not simultaneously claim immunity from that forum's authority as defendant.

662 F. Supp. 2d at 201.

Festiva Hospitality seek to do here: They want to enjoy the full benefits of Tennessee's courts *as plaintiffs*, but also seeks to retain immunity from Tennessee's courts *as defendants* with respect to claims asserted by the very party they was suing, *i.e.*, the Tennessee Attorney General. In cases of consent, a conventional jurisdictional analysis is not required. As the *General Contracting* court held, "We bypass [a conventional jurisdictional] analysis . . . because of our conclusion that [the out-of-state corporate defendant] submitted itself to the court's personal jurisdiction by instituting Suit No. 2, thus making a conventional long arm analysis irrelevant." *Id.* at 22.[32]

Capriotti's Sandwich Shop, Inc. v. Taylor Family Holdings, Inc., 857 F. Supp. 2d 489 (D. Del. 2012) is equally instructive on this point, and dispels any argument defendants might make regarding the federal / state court dichotomy. In *Capriotti's*, the court considered the question of waiver or consent to personal jurisdiction in the context of related suits that were pending in the state and federal courts of Delaware. A Nevada franchisor filed a Lanham Act case against a Nevada franchisee in a Delaware federal court and moved for a preliminary injunction to prevent the franchisee from continuing operations. *Id.* at 492. The following day, the franchisee filed suit against the franchisor in a Delaware state court seeking a temporary restraining order to prevent termination of the franchise. *Id.* at 495. The franchisee later filed a motion to dismiss or transfer the federal case asserting, *inter alia*, personal jurisdiction grounds. *Id.* The court recognized that "[b]ecause the defense [of personal jurisdiction] is a personal right, it may be obviated by consent or otherwise waived." *Id.* at 499 (quoting *General Contracting*, 940 F.2d at 22). The court further held that "[a] party may consent to jurisdiction in a number of ways, and the party may do so before the initiation of the suit, at the time the suit is brought, or after the suit has gotten underway." *Id.* at 500 (citing *General Contracting*, 940 F.2d at 22, 23-24). In rejecting the defendant's argument that waiver could not occur

[32] The court also held that the "fine distinctions between 'waiver' and 'consent'" were "artificial and unnecessary." *Id.* at 22-23.

between a state and federal court in Delaware, the court looked to *Praetorian Specialty Ins.*, in which that court explained:

> [I]t is settled that the concept of a "state's courts" includes all of the federal **and** state courts within a state. In other words, the significance of the out-of-state, corporate defendant's actions in [*General Contracting*] was not limited to the fact that the defendant filed a second lawsuit **in the very federal district court** where the lawsuit in which it was contesting personal jurisdiction was pending. Rather, it was significant that the defendant voluntarily chose to initiate the second lawsuit in **a New Hampshire court**.

Id. (quoting *Praetorian Specialty Ins.*, 829 F. Supp. 2d at 465 and citing *General Contracting*, 940 F.2d at 23). The court concluded by holding that "[c]onsistent with the above[-cited] authority, the court finds that, by filing suit in the Delaware Court of Chancery, defendants at bar have waived jurisdictional defenses and consented to the jurisdiction of this [federal district] court." *Id.* at 501.[33] Courts universally agree that the state and federal courts in a

[33] There is a substantial body of case law on point. *See, e.g.*, *SpaceCo Bus. Solutions, Inc. v. Mass Eng'red Design, Inc.*, 942 F. Supp. 2d 1148, 1156 (D. Colo. 2013) ("Personal jurisdiction may be based upon implied consent or waiver when a non-resident files a claim in the forum state that involves the same transaction."); *Boatright Family, LLC v. Reservation Ctr., Inc.*, No. CIV-13-192-D, 2013 WL 3563766, at *4 (W.D. Okla. July 11, 2013) ("Courts have found personal jurisdiction where a non-resident party has previously filed litigation in the forum state involving the same transaction at issue") (quoting *George Mason Univ. Found., Inc. v. Morris*, Civil Action No. 3:11-CV-848, 2012 WL 1222589, at *5 (E.D. Va. Apr. 11, 2012)); *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 443 (3d Cir. 1999) ("[W]here a party seeks affirmative relief from a court, it normally submits itself to the jurisdiction of the court with respect to the adjudication of claims arising from the same subject matter."); *Powervip, Inc. v. Static Control Components, Inc.*, No. 1:08-CV-382, 2009 WL 152106, at *8 (W.D. Mich. Jan. 21, 2009) ("[B]y filing the [Middle District of North Carolina] action against Future asserting essentially the same patents at issue here, ICT consented to jurisdiction in North Carolina to a suit by Plaintiffs"); *Neuralstem, Inc. v. StemCells, Inc.*, 573 F. Supp. 2d 888, 897-98 (D. Md. 2008) (patent licensee consented to the jurisdiction in Maryland federal lawsuit filed by a competitor as a result of filing a related prior lawsuit in Maryland against the competitor); *Friedman & Friedman, Ltd. v. Tim McCandless Inc.*, Nos. C05-2007, C05-0114, 2005 WL 3059575, at *1 (N.D. Iowa Nov. 15, 2005) ("Enders is a named plaintiff in case number C05-2007. . . . Thus, Enders has voluntarily invoked the benefits and protections of the federal courts here in Iowa."); *Kennedy Ship & Repair, L.P. v. Loc Tran*, 256 F. Supp. 2d 678, 684 (S.D. Tex. 2003) ("In fact, the Court cannot think of a better textbook example of a non-resident invoking Texas' benefits and protections than a non-resident filing a lawsuit in a Texas court in his individual capacity, as the Defendant did here, and such suit now serves as the basis of Plaintiffs' claims."); *Foster Wheeler Energy Corp. v. Metallgesellschaft AG*, Civ. A. No. 91-

particular state constitute that state's or forum's courts for purposes of waiver or consent to personal jurisdiction. *See, e.g.*, *American Family Life Assurance Co. of Columbus v. Biles*, Civil Action No. 3:10CV667TSL-FKB, 2011 WL 4014463, at*2 (S.D. Miss. Sept. 8, 2011); *Larson v. Galliher*, No. 2:06–CV–1471–RCJ–GWF, 2007 WL 81930, at *2 (D. Nev. Jan. 5, 2007). *See also Burt Hill, Inc. v. Hassan*, Civil Action No. 09-1285, 2010 WL 92469, at *1 (W.D. Pa. 2010) ("The fact that Defendant filed suit in state court is of no consequence."); *Marron*, 662 F. Supp. 2d at 200 n.9 ("[T]he courts of a forum state include those [state and] federal courts located within the state for purposes of personal jurisdiction," and, "therefore, [it is] irrelevant to the court's analysis that the [d]efendant initiated suit in [ ] state court, rather than federal court.") (citations omitted).

In most cases, courts generally require that the parties to the two proceedings be the same or in privity, and that the two proceedings be related in some way.[34] Here, both

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214-SLR, 1993 WL 669447, at *1 (D. Del. 1993) ("[A] court may assert personal jurisdiction over a party on the ground that the party consented to jurisdiction by submitting itself to a court's jurisdiction by instituting another, related suit."); *Lyman Steel Corp. v. Ferrostaal Metals Corp.*, 747 F. Supp. 389, 397 (N.D. Ohio 1990) ("Voluntarily filing a lawsuit . . . where the facts similarly arise from the same series of events as another [prior] lawsuit can be deemed another indication of purposeful availment of the forum."); *Sea Foods Co. v. O.M. Foods Co.*, 58 Cal. Rptr. 3d 700, 713 (Cal. Ct. App. 2007) ("Specifically, when a party has availed itself of the courts of California, that party is held to have impliedly consented to jurisdiction in any action related to the action it brought."); *Harrison v. Lovett*, 31 S.E.2d 799, 802 (Ga. 1944) ("[W]here a non-resident voluntarily institutes a suit in this State, he submits himself, for all purposes of that suit, to the jurisdiction of the courts of the county in which the suit is pending. . . ."). *Cf. Frank's Casing Crew & Rental Tools, Inc. v. PMR Techs., Ltd.*, 292 F.3d 1363, 1372 (Fed. Cir. 2002) (patent assignee waived personal jurisdiction defense by bringing unrelated third-party class action claims through an amended complaint); *Threlkeld v. Tucker*, 496 F.2d 1101 (9th Cir. 1974) (husband's prior use of California courts against his ex-wife subjected him to long-arm jurisdiction in California in a suit filed by wife 14 months later); *In re Am. Export Grp. Int'l Serv., Inc.*, 167 B.R. 311, 313-14 (Bankr. D.D.C. 1994) (by filing a proof of claim, creditor submitted to bankruptcy court's jurisdiction in related adversary proceeding.).

[34] Courts use a variety of terms to describe the "related suit" requirement. *See, e.g.*, *General Contracting*, 940 F.2d at 23 ("same nucleus of operative facts"); *Boatright Family*, 2013 WL 3563766, at *4 ("a related transaction which resulted in a judgment"); *Tuckerbrook Alt. Invs., LP v. Banerjee*, 754 F. Supp. 2d 177, 184 (D. Mass. 2010) ("same nucleus of operative fact as the present suit"); *Marron* 662 F. Supp. 2d at 200 ("the two

requirements are met because the parties to both actions are the same or in privity, and these defendants' prior lawsuit against the Attorney General was related to the subject matter of this suit. Thus, all the conditions for waiver or consent of personal jurisdiction have been met.

The State Has Adequately Alleged Facts Regarding Personal Jurisdiction

The Tennessee long-arm statute has been "construe[d] to extend to the limits of due process." *Neal v. Janssen*, 270 F.3d 328, 331 (6th Cir. 2001). Specific jurisdiction is determined by a three-part test: (1) "the defendant must purposefully avail himself [or herself] of the privilege of acting in the forum state or causing a consequence in the forum state;" (2) "the cause of action must arise from the defendant's activities there;" and (3) "the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable." *Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir.1968).

As set forth in earlier sections, the State has adequately alleged personal jurisdiction facts. The Tennessee long-arm statute confers "jurisdiction of the courts of this state as to any action or claim for relief arising from . . . [t]he transaction of any business within the state [or] [e]ntering into a contract for services to be rendered . . . in this state [or][a]ny basis not inconsistent with the constitution of this state or of the United States." Tenn. Code Ann. § 20–2–214(a)(1), (5), (6). The allegations of the Complaint readily meet this standard. The Sixth Circuit has instructed that:

> [t]he bedrock principle of personal jurisdiction due process analysis is that when the Defendant is not physically present in the forum, [he or she] must have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. "Minimum

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actions share a common transactional core"); *Neuralstem*, 573 F. Supp. 2d at 897–98 (the two actions "were significantly intertwined and involved the same transaction or occurrence"); *Larson*, 2007 WL 81930 at *2 ("same set of operative facts"); *Lyman Steel*, 747 F. Supp. at 397 ("same series of events"); *Foster Wheeler*, 1993 WL 669447, at *1 ("related suit"). On the other hand, if the earlier proceeding was unrelated, then personal jurisdiction will not be deemed to have been waived. *See, e.g.*, *Fidelity Nat'l Fin., Inc. v. Friedman*, No. CIV 03–1222 PHX RCB, 2010 WL 960420, *4 (D. Ariz. Mar. 15, 2010).

> contacts" exist when the Defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. It is necessary that the Defendant purposefully avail [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person. Random, fortuitous, or attenuated activity is not a constitutionally adequate basis for jurisdiction.

324 F.3d at 417 (internal citations and quotation marks omitted). In deciding whether plaintiff made a prima facie basis for jurisdiction, the court should read the complaint liberally, in its entirety, with every inference drawn in plaintiff's favor. *See Cent. States, Se. and Sw. Areas Pension Fund v. Phencorp Reinsurance Co.*, 440 F.3d 870 (7th Cir. 2006). Here, the out-of-state's defendants' alleged deceptive conduct itself forms the basis for this Court's personal jurisdiction. *See, e.g., Consumer Protection Div. v. Outdoor World Corp.*, 603 A.2d 1376 (Md. Ct. App. 1992) (Deceptive solicitations mailed to consumers in Maryland held sufficient for personal jurisdiction purposes even though some solicitations conduct occurred out of state).

The Complaint sufficiently alleges that Defendants acted in concert, as agents of one another, and in a common enterprise

The Rule 12(b)(2) Moving Defendants attempt to disavow Tennessee contacts, but the State's Complaint pleads sufficient facts to establish a plausible claim that Clayton, Patrick, Hartnett, and Festiva acted in concert, as agents of one another, and as a common enterprise. The Rule 12(b)(2) motion fails because the facts demonstrate that Defendants: (1) exercised common control; (2) shared officers and directors; (3) were controlled by the same individual owners and operators; (4) operated through a maze of interrelated companies; (5) shared office space at the same business address; and (6) conducted financial reporting in consolidated fashion, no agency or common enterprise existed among the defendants. A contrary conclusion would be at odds with a large body of federal law on common enterprise liability under the FTC Act, which must be followed here under Tenn. Code Ann. § 47-18-115.

Courts have opined that "when determining whether a common enterprise exists, courts look to a variety of factors, including: common control, the sharing of office space and officers, whether business is transacted through a maze of interrelated companies, unified advertising, and evidence which reveals that no real distinction existed between the [c]orporate [d]efendants." *See, e.g.*, *FTC v. Millennium Telecard, Inc.*, No. 11-2479, 2011 WL 2745963, at *8 (D.N.J. July 12, 2011) (quoting *FTC v. Wolf*, No. 94-8119, 1996 WL 812940, at *7 (S.D. Fla. Jan. 31, 1996)) (internal quotations omitted). *See also FTC v. NHS Sys., Inc.*, No. 08-2215, 2013 WL 1285424, at *7 (E.D. Pa. Mar. 28, 2013) (applying the same standard and finding defendants jointly and severally liable for unfair and deceptive acts and practices in violation of the FTC Act). Other Courts of Appeals have recognized additional factors in determining whether a common enterprise exists, including "pooled resources [and] staff." *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1143 (9th Cir. 2010). No one factor is controlling, as "the pattern and frame-work of the whole enterprise must be taken into consideration." *Del. Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964) (internal quotations and citation omitted). *See also Del. Watch Co.*, 332 F.2d at 746-47 (finding that corporate entities engaged in a deceptive advertising campaign were transacting an integrated business through a maze of interrelated companies); *Waltham Precision Instrument Co. v. FTC*, 327 F.2d 427, 431 (7th Cir. 1964) (treating all defendants in a deceptive advertising case as a single entity where there was common control and they shared the same officers and directors).

Applying these factors, the Complaint alleges sufficient facts that, taken as true, plead a claim that Clayton, Patrick, Hartnett and Festiva operate in concert as agents of one another, or as a common enterprise. As part of their common and interdependent operations, each defendant played a role in the unfair and deceptive acts and practices at issue in the Complaint —from controlling the corporate network, to participating in, and controlling, the association

boards at the Festiva resorts, to operating the resorts themselves. The Rule 12(b)(2) motion to dismiss should therefore be denied.

VI. CONCLUSION

For all of reasons set forth herein, moving defendants and relief defendants misconstrue the law. The motion to dismiss should be denied. Should the Court should determine that any part of the Complaint is deficient under the Federal Rules of Civil procedure, then and in that event the State respectfully requests the opportunity to present a more definite statement and/or otherwise amend the Complaint without further leave of court.

Respectfully Submitted,

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Dated: August 20, 2014

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been served, via the Court's ECF system on this the 20th day of August 2014, as follows:

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